

On this evidence I am asked to find that the will of 19th January, 1949 was made when the testator was not of sound mind.

The facts that I have to consider are first, that the testator was extremely ill at the time; secondly, that the will is extraordinary in that it makes no provision for his son—a most unusual omission for a Chinese testator to make—and thirdly, that the testator told Rajan that he had no child. There is a further matter which I must also bear in mind, namely that the instructions for drawing the will were given in Chinese and interpreted by a person who has not been called and that the prepared will was also interpreted by the same person to the testator in Chinese. There is, therefore, no certain evidence of what was conveyed to the testator. The fact that the will was read over in Malay first and that the testator had some understanding of Malay is, of course, of importance but Malay was not the testator's mother tongue and the fact that it was interpreted into Chinese for his benefit indicates a doubt of his proper understanding of what was said in Malay.

As regards the first fact, there is the evidence of Dr. Somasundaram that patients suffering from tuberculosis are not usually affected mentally by this disease until about five or six hours before death, unless there are complications, of which there is no evidence here.

As regards the second fact that the will is extraordinary the defendant explains this by alleging that plaintiff quarrelled frequently with deceased, that she demanded money from him and when this was refused departed in a fit of anger leaving her child behind. This story is corroborated by Lee Nam who says deceased told him he was heart broken that plaintiff did not come and look after him and that he intended leaving all his property to defendant. He also said deceased informed him that plaintiff had left her child with him.

There is a direct conflict of evidence on this point as plaintiff denies that she ever quarrelled with deceased and alleges that she and defendant took turns of living with deceased and looking after him. Also she says she never demanded money from deceased and has never at any time been separated from her child. Her story was confirmed by deceased's nephew Goh Seng Kee, who appeared to be a reliable witness and to have justified deceased's trust in him.

In these circumstances I can only say that defendant's explanation does not satisfy me and I must regard the will as an extraordinary one for a Chinese to make. I think that fact coupled with the fact that

deceased told Rajan that he had no child is sufficient to justify a finding that owing to his illness deceased's memory was not sound at the time he gave instructions for the will.

In *Battan Singh v. Amirchand*<sup>(1)</sup> it was held that if at the time of making his will a testator was, through disease, so deficient in memory that he was oblivious to the claims of his relatives and if that forgetfulness was an inducing cause of his choosing others to be his legatees his will is invalid.

I think this ruling exactly fits the circumstances of this case. The testator was oblivious to his son's claims owing to his memory being deficient through illness and it was his deficiency in memory that caused him to omit his son from his will and to say to Rajan that he had no child. I therefore pronounce the will dated 19th January, 1949 to be invalid and revoke the grant of probate thereof.

The will dated 31st October, 1947 has been proved in solemn form and I pronounce it to be the true last will of the testator.

Costs to be taxed and paid out of the estate including profit costs.

*Will pronounced invalid.*

**SP. PL. PALANIAPPA CHETTIAR v.  
V.R.M.V. LETCHUMANAN CHETTIAR.**

[Orig. Civ. Juris. (Jobling, J.) September 15, 1950]

[Penang—Civil Suit No. 261 of 1949]

*Vendor and purchaser—Contract for sale—  
Covenant to extract grant of letters of administration  
—Default of vendor in obtaining grant of letters of  
administration—Specific performance—Damages.*

In this case the defendant entered into an agreement for sale of certain property in Burmah Road belonging to his deceased father to the plaintiff for \$105,000/- Japanese currency and this amount was paid to the defendant by the plaintiff. The defendant agreed and covenanted to extract the grant of letters of administration as early as possible and to apply to Government for the necessary permission to sell the land to the plaintiff.

The defendant did not do all he could to carry out his obligation to extract the grant of letters of administration. He also renounced his right to the grant.

The plaintiff claimed specific performance of the agreement for sale or alternatively for damages.

Held, that the plaintiff having performed his part of the contract was entitled to damages. The Court applying the principle laid down in *Day v. Singleton*<sup>(1)</sup> awarded the plaintiff damages and assessed it at \$30,000/-.

*Case referred to:—*

(1) *Day v. Singleton* (1899) 2 Ch. 320.

ACTION.

*Ong Huck Lim* for the plaintiff.

*E. A. de Buriatte* for the defendant.

The facts sufficiently appear from the judgment.

*Cur. Adv. Vult.*

**Jobling, J.:** — The plaintiff in this case claims specific performance of an agreement for sale of certain property executed by the defendant or alternatively for damages.

The facts in the matter are admitted and are as follows:

The defendant is the son of one Vengadasalam Chettiar who died in India in April, 1942. The defendant was at that time the only member of deceased's family in Penang and was carrying on deceased's business under a Power of Attorney from deceased. This Power was extinguished by deceased's death and defendant applied for letters of administration to his father's estate carrying on the business in the meantime. His application was approved subject for the due administration of the estate by defendant being forthcoming. The defendant was unable to obtain the sureties.

The deceased prior to his death had charged certain property in Burmah Road, Penang to the Indian Overseas Bank by way of equitable mortgage to secure a sum over \$30,000/- and after deceased's death the Bank demanded payment of the advance from defendant.

Defendant negotiated the sale of the Burmah Road property to the plaintiff for \$75,000/- and later in June, 1945 when he entered into the agreement of sale he demanded a higher price on the ground that prices had generally increased and it was agreed the purchase price should be \$105,000/- Japanese currency and this amount was paid to defendant. The agreement for sale was then executed and in it defendant agreed and covenanted to extract the grant of letters of administration as early as possible and to apply to Government for the necessary permission to sell the land to the plaintiff.

Plaintiff was aware of the difficulty of obtaining sureties and offered himself as one. Defendant did not, however, succeed in obtaining the second surety and did not extract the letters of administration. The day before the hearing of this claim he renounced his right to letters of administration and his brother, the only other beneficiary has applied for representation to the estate.

The defendant is sued in his personal capacity on the agreement. Defendant states that he could not

extract the letters of administration because he could not obtain sureties. He says this was due to the fact that the Japanese were in occupation of Malaya at the time and the proprietors of the Chettiar firms (among whom he would normally have expected to find sureties) were in India. Defendant did not, however, take any steps to obtain sureties after the re-occupation of Malaya. He says he did not do so because he was not satisfied that the estate was solvent but admitted in evidence that his brother would not agree to the sale of the Burmah Road property to plaintiff. Further, defendant did not apply to the Court to accept plaintiff as sole surety, although he was aware that plaintiff was a man of substance.

It is clear that defendant has not done all he could to carry out his obligation to extract letters of administration and he has now put the performance of his agreement out of his power by renouncing his right to a grant. Specific performance of the agreement is now impossible but defendant is at fault and plaintiff is due damages for the loss he has sustained. His counsel does not dispute this but urges that the cause of action arose during the Japanese occupation and the damages must be in Japanese currency as at the date the cause of action arose.

Evidence was led that the value of the property at the time of the agreement was \$30,000/- Malayan currency and that that is still its value to-day. The fact that plaintiff paid \$105,000/- Japanese currency for the property is beside the point. The measure of damages for non-performance of an agreement of this nature is stated in *Day v. Singleton*<sup>(1)</sup> to include damages sustained by plaintiff for loss of his bargain, and I see no reason why this decision should not apply in this case.

The plaintiff performed his part of the contract to purchase the property paying the agreed purchase price and entering into possession which he still retains. To be turned out now after five years because of the fault of defendant entitles him to damages for the loss of his bargain and this can only be the market price of the property.

Mr. de Buriatte has contended that the cause of action arose in 1945 when defendant failed to extract the grant and that damages should be assessed as at that date. The point is however of no consequence here as the value of the property appears to be the same now as then \$30,000/- and that must be the measure of damages.

Judgment for the plaintiff for \$30,000/- damages and costs.

*Judgment for the plaintiff.*

**Re LOW SHONG KHAY, ex parte  
SIME DARBY & CO., LTD.**

[Bankruptcy Jurisdiction (Taylor, J.) October 3, 1950]

[Selangor — Bankruptcy No. 5 of 1950]

*Bankruptcy procedure — Whether affidavit can be read if the deponent fails to attend for cross-examination after due notice.*

In bankruptcy the Court will not allow an affidavit to be read if the deponent fails to attend for cross-examination after due notice. *Re Krishnasami*<sup>(1)</sup> followed; *Chan Chou Har v. Chan Phooi Hoong*<sup>(2)</sup> distinguished.

This was a creditor's petition for a receiving order; the debtor filed an affidavit in opposition; the petitioning creditors gave notice to cross-examine him on his affidavit; when the petition came on for hearing the debtor was not present.

Cases referred to:—

- (1) *Re Krishnasami* (1933) M.L.J. 195; (1933-1934) F.M.S.L.R. 8.
- (2) *Chan Chou Har v. Chan Phooi Hoong* (1939) M.L.J. 327.

**BANKRUPTCY PETITION.**

*F. G. Charlesworth*, for the petitioning creditors, objected to the affidavit being read, relying on *Re Krishnasami*, *supra*.

*M. N. Cumarasami*, for the debtor, argued that *Krishnasami's* case was, in effect, overruled by *Chan Chou Har's* case, *supra*.

**Taylor, J. :** — Our bankruptcy procedure follows very closely the English procedure at the date when the Rules were made and the English cases and practice are applicable. The Rules constitute a code of procedure quite separate from, and independent of, the Civil Procedure Code; this is emphasised by Rule 287; the two systems are quite distinct in their history, purpose and scope.

The course which *Krishnasami's* case<sup>(1)</sup> took in the Court of Appeal was peculiar and it seems not improbable that other reasons contributed to the result. However that may be, there was no decision of the higher Court and, regarded as an authority, the decision at first instance was neither affirmed nor doubted; it stands as the opinion of a single Judge. The judgment in *Chan Chou Har's* case<sup>(2)</sup> is expressly founded on the Civil Procedure Code, and is not in point here. If the learned Judge's attention had been directed to Rule 287, I think he could, and would, have reached the same conclusion without feeling that *Krishnasami's* case raised any difficulty.

The two cases deal differently with the same point but they do not conflict; they deal with it in

different circumstances to which different legal rules apply.

The point now arising in a bankruptcy, I follow the bankruptcy precedent without departing from the precedent created in a civil action.

The affidavit cannot be read.

*Order accordingly.*

**CHEONG YOK CHOY AND ANOR. v. THE  
COLLECTOR OF STAMP DUTIES,  
KUALA LUMPUR.**

[App. Civ. Juris. (Taylor, J.) October 16, 1950]

[K.L. — Civil Appeal No. 10 of 1950]

*Stamp Ordinance, 1949, ss. 16 and 39 — Procedure by case stated — Valuation of land by the Collector of Land Revenue.*

Where the value of land affects the stamp duty on an instrument, the Collector of Land Revenue may be consulted and his opinion is admissible evidence of the value but may be controverted by other evidence.

On an appeal by way of case stated the appellants' solicitors should make the first draft of the case and the case should contain all necessary materials.

APPEAL to the High Court under section 39 of the Stamp Ordinance, 1949 (No. 59 of 1949).

*E. A. S. Wagner* for the appellants.

*T. V. A. Brodie* (Acting Solicitor-General) for the Collector of Stamp Duties, Kuala Lumpur.

The facts sufficiently appear from the Judgment.

*Cur. Adv. Vult.*

**Taylor, J. :** — This is an appeal from a decision of the Collector of Stamp Duties, Kuala Lumpur.

The appellants, who are father and son, are persons of considerable substance. The father decided to transfer certain lands in Kuala Lumpur Town to his son. After consultation with their solicitor the consideration was fixed at \$45,000.

This was not nominal. A cheque was drawn by the son and actually paid into the father's account by the solicitor. The transfer was stamped with \$450, this being appropriate to the consideration at the present rate of 1% *ad valorem*. The Registrar of Titles, doubting whether the instrument was sufficiently stamped, referred it to the Collector of Land Revenue who valued the land at \$56,000. The Registrar then referred the instrument to the Collector of Stamp Duties who claimed further stamp duty of \$110 on the basis of the land officer's valuation. The parties maintained that the instrument was sufficiently stamped